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LIBERTY OF CONTRACT NOW A WELL DEFINED RIGHT UNDER THE FEDERAL CONSTITUTION.

Important questions of constitutional law have recently been definitely settled by the United States Supreme Court, not the least important of which is that broad question as to what extent the Fifth Amendment protected the liberty of the citizen to contract.

Three great cases have now already defined the term "liberty of contract," to-wit: Allgeyer v. Louisiana, 165 U. S. 578; Lochner v. New York, 198 U. S. 45, and Adair v. United States, decided January 27, 1908. In the Allgeyer case the general principle was laid down that the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the federal constitution. In the Lochner case it was held that an enactment prescribing certain maximum hours for labor in bakeries, and which made it a misdemeanor for an employer to require or permit an employee in such an establishment to work in excess of a given number of hours each day was unconstitutional on the ground that such legislation constituted an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family.

In the Adair case, which we have before us at this time, it was held that an act of congress which made it a crime for an interstate railway corporation to discharge a servant from its employment because of his membership in a labor union, was void as an unlawful and an unjustifiable interference with the citizen's liberty of contract.

Speaking of the extent of the operation of the Fifth Amendment in such case, Justice Harlan, in a most admirable argument, says: "Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained, which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good. Without stopping to consider what would have been the rights of the railroad company under the Fifth Amendment, had it been indicted under the act of congress, it is sufficient in this case to say that as agent of the railroad company and as such responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him."

Meeting further objection in regard to the extent of the police power, and showing that this undefinable and vaguely defined legislative authority did not extend to cases where there was no unreasonable or appropriate ground for such extraordinary interference with the rights of persons and property, the learned judge goes on to observe: "While, as already suggested, the rights of liberty and property, guaranteed by the constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may re-

quire, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper, is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

Another point of interest in this case was whether such legislation was within the authority of congress to control interstate commerce, and therefore to be sustained as a regulation of commerce. The point is especially interesting in view of the recent case of Howard v. Illinois Central Railroad, 66 Cent. L. J. 67, where the same court, by a vote of six to three, sustained the authority of congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in cases of personal injuries received by employees while actually engaged in such commerce. The decision in that case was placed on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would, therefore, be within the competency of congress to establish for commerce among the states, but not as to commerce completely internal to a state.

In limiting the powers of congress to prescribe the rules of law applicable to persons engaged in interstate commerce, to such subjects as have some "substantial relation to the commerce regulated," Justice Harlan says: "Manifestly any rule prescribed for the conduct of interstate commerce, in order to be within the competency of congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself*, and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage earners—an object entirely legitimate and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. One who engages in the service of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot in law or sound reason depend in any degree upon his being or not being a member of a labor organization."

Concluding his splendid argument in this great case Justice Harlan says: "Looking

alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in congress, it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business *only* members of labor organizations, or *only* those who are *not* members of such organizations—a power which could not be recognized as existing under the constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as, in any just sense, a regulation of interstate commerce."

Readers of the Central Law Journal who have followed our contentions from time to time that the labor unions were overreaching themselves and trampling ruthlessly over important constitutional safeguards in their unreasonable efforts to attain absolute industrial supremacy, will recognize in this case another evidence of the soundness of our position, a position, too, which has not been infrequently criticised.

We hold no brief for the "scab" laborer. We believe, indeed, that all trades are benefitted by organization, and that such organization should be encouraged, but we do intend to raise our voice when the leaders of such organizations combine to force legislation which denies to any employer "fair" or "unfair," or any employee, "union" or "scab," the full and equal protection of the laws, or deprives him of his liberty or his property without due process of law. Equality before the law is the fundamental principle of American jurisprudence, the slightest encroachment upon which should be met with instant and stern disapproval.

NOTES OF IMPORTANT DECISIONS.

ATTORNEY AND CLIENT—DOES THE FACT THAT AN ATTORNEY SIGNS A CLIENT'S BOND IN VIOLATION OF STATUTE INVALIDATE THE BOND?—The question propounded in the above title was answered in the negative by the Court of Appeals of Georgia in the recent case of Husband Bros. v. Railway Co., 59 S. E. Rep. 326. The court said: "This was a certiorari from a justice court. On the call of the case in the superior court, counsel for defendant in certiorari moved to dismiss the certiorari proceeding on the ground that the certiorari bond was signed by an attorney at law, who was an officer of the court, and that therefore the bond was void and of no effect. The court sustained the motion and dismissed the certiorari upon this ground, and the sole question before this court is whether this judgment was erroneous. Independently of any prohibitory statute or rule of court, an attorney at law or any other officer of the court would have a right to become surety on any bond or obligation which the law requires as a necessary part of the proceedings in a case. We do not think, however, from an ethical standpoint, that an attorney at law, and especially in the case in which he is acting as attorney, should ever assume the obligation of bail or surety. Since 1654 it has been the rule in England that attorneys cannot become bail or surety in court proceedings, and this rule has been generally adopted by statute law in this country, or by rules of courts on the subject. In this state the matter is regulated by a rule of the court. Rules of Superior Court, Civ. Code 1895, sec. 5641. It has been uniformly held that this statute or rule of court is directory merely, and if an attorney, in violation of the statute or rule of court, does become such surety or bail, his obligation is neither void nor voidable, and the purpose of the regulation would be sufficiently accomplished by punishing the attorney for contempt of court, without holding the bond a nullity. Weeks on Attorneys, sec. 119; 3 Amer. & Eng. Enc. of Law (2d Ed.) p. 291, note 6; 4 Cyc. 919, and cases cited; Burton v. Wynne, 55 Ga. 615."

SHOULD THE DOCTRINE OF THE "TURNTABLE" CASES, HOLDING RAILROAD CORPORATIONS LIABLE FOR INJURIES TO TRESPASSING CHILDREN, BE EXTENDED SO AS TO MAKE LAND OWNERS LIABLE FOR INJURIES CAUSED TO TRESPASSING CHILDREN BY UNGUARDED DITCHES, PONDS, ETC.?

It is a general and fundamental proposition of law that the owner of real estate is under no duty to keep it in any particu-

lar condition for the benefit of trespassers or of volunteers going upon the same for their own purposes,[1] and the fact that such trespassers are infants, does not alter the rule of law.[2] This right to maintain property as one pleases, is one of the essentials of ownership, and is one of those essentials which makes the ownership of property desirable.

But at the outset we are met with a restriction placed upon the ownership of property, which limits the use thereof to those uses which will not injure the person or property of others. This prohibition is tersely stated in the ancient maxim: *"Prohibetur ne quis faciat in suo quod nocere possit alieno."* (It is prohibited to do on one's own property that which may injure another's). So if the act done on one's own property, although right in itself, will likely cause some one to expose himself to danger which he does not anticipate, it becomes the land-owner's duty to take care that such exposure does not prove injurious to such person. As to the land-owner's duty under such circumstances, it is said: "In determining the question whether the act will induce such exposer, it becames the owner's duty to consider the motives and impulses that induce actions by those who are likely to be influenced by his act. If men may be misled in their judgment by his act, he must take measures to warn them, or to avoid injuring them by proper care. If children, from their own childish instinct and curiosity, may be led into danger, such care is due them also."[3]

The exceptions to the general rule, that a land-owner owes no duty to trespassing children, have been divided into the two following classes by one authority: "(a) A land-owner without suffering the consequences, may not maintain a nuisance, especially attractive to children. (b) He may not maintain pit falls adjacent to public highways or sidewalks."[4] To these should be added the duty not to injure such trespassers willfully, and according to the holdings in several of the states, division (a) should include all dangerous machinery attractive to children, whether the same are nuisances or not.[5]

There is a class of cases against railroad corporations, involving the question of the liability for injuries to trespassing children, known as the "turn-table cases," for the reason that they arose over injuries sustained by children while playing on railroad turn-tables. The initial case of this character, holding that the railroad company was liable for such injuries, is the case of Stout v. Sioux City & P. R. Co.[6] In that case plaintiff, who was an infant 6 years old, sued for personal injuries received while playing upon the defendant's turn-table. Upon the first trial, which resulted in a disagreement, Mr. Justice Dundy of the United States Circuit Court, District of Nebraska, instructed the jury that "if the turn-table was a heavy and dangerous machine, and in a public place where children were in the habit of going to play upon it with the knowledge of defendant, or its servants, then it would seem to me to be necessary to prptect it in some way, either by fastening it or by enclosing the same; but if it was remote from places of public resort, or if the defendant or its servants had no knowledge of the boys going there to play upon it, so that no danger could be reasonably apprehended from it, even though it may have been in the open prairie, I do not think such diligence should be required of the defendant. So the degree of diligence in such a case would greatly depend upon

(1) 1 Thomp. Neg., p. 303; 2 Shearm. & Redf. Neg. (4th ed.), sec. 815; Indianapolis Water Co. v. Harold (Ind. App.), 79 N. E. Rep. 542, and cases there cited.

(2) Whittaker's Smith, Neg., 2d ed., 67, note; Hargreaves v. Deacon, 25 Mich. 1; Murphy v. Brooklyn, 118 N. Y. 575, 23 N. E. Rep. 887; Missouri, K. & T. R. Co. v. Dobbins (Tex. Civ. App.), 40 S. W. Rep. 861; Morrissey v. R. Co., 15 R. I. 271.

(3) Ray, Neg. of Imposed Duties (Personal), p. 33.

(4) Indianapolis Water Co. v. Harold (Ind. App.), 79 N. E. Rep. 542. Dissenting Opinion by Willey, J.

(5) Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745.

(6) Sioux City & P. R. Co. v. Stout, 2 Dill. 294, 11 Am. L. Reg. (N. S.) 226. Same case in the U. S. Supreme Court, 84 U. S. (17 Wall.) 657, 21 L. Ed. 745.

the locality in which the turn-table might be found." Upon the second trial, Judge Dillon, in charging the jury, followed practically the charge given in the first trial emphasizing *scienter* as an element of defendant's liability. He said: "If the defendant did know, or had reason to believe, under the circumstances of the case that the children of the place would resort to the turn-table to play; and if they did they would or might be injured, then, if it took no means to keep the children away, and no means to prevent accidents, it would be guilty of negligence, and would be answerable for damages caused to children by such negligence."

This holding of the District Court of Nebraska was upheld on appeal by the Supreme Court of the United States,[7] and has been followed by the courts of last resort in many of the states.[8]

The case of Keffe v. Milwaukee & St. Paul Railway Company[9] is an interesting one, and the opinion of the court delivered by Mr. Justice Young of the Supreme Court of Minnesota, presents fully the arguments upon which a liability against railroad companies, in cases of this nature, is upheld. The action was brought by the plaintiff, an infant, by his guardian, against the defendant to recover for personal injuries received from a railway turn-table belonging to defendant. The facts as set forth in the complaint were these: The turn-table in question, which was owned and operated by defendant, was located on its land, in a public place, within 120 feet from the residence and home of plaintiff, and was unfastened and in no way protected, fenced, guarded or inclosed, to prevent it from being turned around at the pleasure of small children, although it could at all times, be readily locked and securely fastened, and when left unfastened it was very attractive to young children, and while being moved by the children, and at all times when left unfastened, was dangerous to persons upon or near it. Defendant had notice of all these facts, before and at the time of the injury of plaintiff. Plaintiff, together with other children, was playing upon the turn-table, revolving the same, when his leg was caught between the revolving table and the pit thereof and injured. From a judgment for defendant plaintiff appealed. In reversing the judgment of the lower court, the Supreme Court said: "In the elaborate opinion of the court below, which formed the basis of the argument for the defendant in this court, the case is treated as if the plaintiff was a mere trespasser, whose tender years and childish instincts were no excuse for the commission of the trespass, and who had no more right than any other trespasser to require the defendant to exercise care to protect him from receiving injury while upon its turn-table. But we are of the opinion that, upon the facts stated in the complaint, the plaintiff occupied a very different position from that of a mere voluntary trespasser upon the defendant's property, and it is therefore unnecessary to consider whether the proposition advanced by defendant's counsel, viz.: that a land owner owes no duty of care to trespassers, is not too broad a statement of a rule which is true in many instances.

To treat plaintiff as a voluntary trespasser is to ignore the averments of the complaint, that the turn-table, which was situated in a public (by which we understand an open, frequented) place, was, when left unfastened, very attractive, and, when put in motion by them, was dangerous to young children, by whom it could be easily put in motion, and many of them were in the hab-

(7) 84 U. S. (17 Wall. 657), 21 L. Ed. 745.

(8) Nagel v. Missouri Pac. R. Co., 75 Mo. 653; Barrett v. Southern Pac. R. Co., 91 Cal. 296; Kansas Cent. R. Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203 and valuable note; Ft. Worth & D. C. R. Co. v Robertson (Tex.), 14 L. R. A. 781, 37 Kan. 1; Evansich v. Gulf C. & S. F. R. Co., 57 Tex. 123; Ferguson v. Col. & R. R. Co., 77 Ga. 102; A. & N. R. Co. v. Bailey, 11 Neb. 333; Iluaco R. & Nav. Co. v. Hedrick, 1 Wash. 446; O'Malley v. St. Paul M. & M. R. Co., 43 Minn. 289; Chicago, etc., R. R. Co. v. Fox (Ind. App.), 70 N. E. Rep. 81; Gulf C. & F. R. Co. v. McWhirter, 77 Tex. 356; Bridger v. Asheville & S. R. Co., 25 S. C. 24.

(9) 21 Minn. 207, 18 Am. Rep. 393, see opinion of Hull, J., who rendered judgment for appellee (defendant below) in lower court, reported to 2 Cent. Law Jour. 170.

it of going upon it to play. The turntable, being thus attractive, presented to the natural instincts of young children a strong temptation; and such children, following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between plaintiff's position and that of a voluntary trespasser, capable of using care, consists in this that the plaintiff was induced to come upon the defendant's turn-table by the defendant's own conduct, and that, as to him, the turn-table was a hidden danger, a trap. * * * Now, what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years. If the defendant had left his turntable unfastened *for the purpose* of attracting young children to play upon it, knowing the danger that it was thus alluring them, it certainly would be no defense to an action by the plaintiff, who had been attracted upon the turn-table and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass. In Townsend v. Wathen, 9 East 277, it was held to be unlawful for a man to tempt even his neighbor's dogs into danger, by setting traps on his own land, baited with strong scented meat, by which the dogs were allured to come upon his land and into his traps. In that case, Lord Ellenborough asks, 'What is the difference between drawing the animal into the trap by his natural instinct, which he cannot resist, and putting him there by manual force?' * * * The defendant, therefore, knew that, by leaving this turntable unfastened and unguarded, it was not merely inviting young children to come upon the turntable, but was holding out an allurement, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault, (for it cannot blame them for not resisting the temptation, it has set before them), it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves."

A prominent text book writer on railway law[10] suggests, as a further reason why railroad companies should be held liable in these cases, that "railway companies do not hold their property be precisely the same tenure as an individual does; they are *quasi* public corporations, and by a species of common consent, which may be said to amount to a usage, people enter upon their tracks and grounds with nearly the same freedom that they do upon public grounds, and without feeling that they are trespassers. While this may not be as a strict matter of legal right, yet it is idle to say that permitting such use, knowingly, and without objection, they nevertheless have the right to expose such *quasi* licenses to any species of danger they may choose to, particularly those not competent to judge of the danger, without incurring liability for the consequences."

Notwithstanding the high standing of the courts holding railroad companies liable for injuries to children trespassing on their turn-tables, these holdings have been directly repudiated by the courts of several of the states.[11]

The Supreme Court of New Hampshire at an early date refused to follow the Stout case in an action for damages brought by a seven-year-old plaintiff against a railroad company for injuries received while playing upon a turn-table of the defendant's road. The ground upon which he sought to recover was that he was attracted to the turn-table by the noise of boys playing up-

(10) Wood's Railway law, p. 1292.

(11) Frost v. Eastern R. Co., 64 N. H. 220, 4 New Eng. Rep. 527; Daniels v. N. Y. & N. E. R. Co. (Mass.), 13 L. R. A. 248; McAlpin v. Powell, 70 N. Y. 126, 26 Am. Rep. 555 (not a turntable case); St. L. V. & T. H. R. Co. v. Bell, 81 Ill. 76, where railroad company was held not liable as the turn-table was in an isolated place and fastened.

on it. The turn-table was upon the defendant's land about sixty feet from a public street, in a cut with high, steep embankments on each side, and was insecurely fastened. It was held that the plaintiff was but a trespasser; and that, under the circumstances, the defendant owed him no duty. On the question whether the defendant was liable on the ground of an implied invitation, Mr. Justice Clark speaking for the court, said: "One having in his possession agricultural or mechanical tools, is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or inclose it, or exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

In a Massachusetts case[12] the court said: "Plaintiff does not contend that he had any express invitation from the defendant to enter upon its premises, but that he was enticed or allured by the attractiveness of the turn-table; and the proposition of law upon which he relies is that if a railroad company leave a turn-table unlocked or unguarded upon its own premises, near a public highway, or in an open and exposed position near the accustomed or probable place of resort of children, it is for the jury to determine, even in the absence of other evidence as to the attractive nature of the turn-table, whether it is, in and of itself, calculated to attract children, and whether a child injured upon it was, in fact attracted or allured by it; that, if so allured or attracted, the child comes upon the premises of the railroad company through its implied invitation or inducement, and is not a bare licensee or trespasser, and that the company owes to such child the duty to refrain from ordinary negligence with respect to the condition and management of its turntable. * * * * * The only thing stated in the exception to show that the turntable was attractive is that it had large, upright standards or guys, twelve to fifteen feet in height, which could be seen from a considerable distance." The opinion of the court upon this question is concisely stated in the syllabus as follows: "A railroad company owes a boy who is a mere passenger on its land no duty to keep its turntable in a safe condition; and no inducement or invitation to him to go upon the premises can be implied from the fact that the situation and condition of the turntable were such as to be likely to attract or allure a boy of his age."

The doctrine of the "turntable cases," being in the nature of an exception to the rule of non-liability of landowners for accidents from visible causes to trespassers on their premises, there is a growing tendency of the courts to not extend this exception. Hence landowners have been held not to be liable for injuries caused to trespassing children by their falling into open and unguarded ditches or ponds upon their premises. The facts that such ditches and ponds could not be readily guarded, and that they are often very common and of a natural formation, are advanced by the courts as reasons which would distinguish them from the turn-table cases.

In the case of McCabe v. American Woolen Co.,[13] the court sustained a demurrer and held the declaration insufficient where it appeared that the defendant maintained an unguarded mill-trench having precipitous banks near the house of the father of the child who fell in and was drowned. The court, while recognizing the Stout

(12) Daniels v. N. Y. & N. E. R. Co. (Mass.) 13 L. R. A. 248.

(13) 124 Fed. Rep. 283. Affirmed in 65 C. C. A. 59. 132 Fed. 1006; See also Slack & Suddoth (Tenn.), 45 L. R. A., 591.

case, said: "The case at bar, however, is essentially distinct in this particular. This canal was permanent, open and plain to view, as much so as though it had been a natural stream, and suggests nothing whatever which would change the relations of the parties from what they would have been had it been a brook or a river. If the defendant is to be holden to this plaintiff for not especially guarding it, then the customs of the community must be changed throughout, because it is impossible to distinguish this canal, for the purpose of this case, from a river or a brook, a haymow, an ox cart left in a farmer's yard, a high ledge, or a field trench, about either of which children may happen to be accustomed to play. We think, therefore, that this canal was an object of such a character, that, both from the reason of the thing and the customs of the community, the defendant was entitled to assume that the plaintiff's natural guardians would protect him from any dangers attached thereto, as they easily could and ought to have done."

In a California case,[14] plaintiff, a boy of eleven years, was drowned by falling off of a raft which was floated on an unguarded and unfenced pond on defendant's grounds. The court also recognized and approved the "turntable cases," but said: "A body of water, either standing as in ponds or lakes, or running as in rivers and creeks, or ebbing and flowing as on the shores of seas and bays, is a natural object incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent, open danger, and knowledge of which is common to all; and there is no just view consistent with the recognized rights of property owners which would compel one owning land upon which such water, or part of it, stands or flows to fill it up, or surround it with an impenetrable wall." On a petition for a rehearing it was said: "A turntable is not only a danger specially created by the act of the owner, but it is a danger of a different kind from those which exist in the order of nature. A pond, although artificially created, is in no wise different from those natural ponds and streams which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. * * * A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot * * * would answer the purpose; and therefore, to make it safe, it must be either filled or drained." The court in speaking of the character of the landowner's duty and liability said: "His liability bears a relation to the character of the thing—whether natural and common or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions."

To the same effect is the ruling in Stendal v. Boyd,[15] where the court said: "It is sought, however, to hold the defendant liable upon the facts stated, upon the principle of the 'turntable cases.' The doctrine of the turntable cases is an exception to the rule of the non liability of a landowner from accidents from visible causes to trespassers on his premises. If the exception is to be extended to this case, then the rule as to non-liability as to trespassers must be abrogated as to children, and every owner of property must, at his peril, make his premises childproof. * * * With the exception of the case of Pekin v. McMahon, the courts of last resort, including those which recognize the doctrine of the turntable cases, have uniformly denied the liability of a landowner for injuries to trespassing children by reason of open and unguarded ponds and excavations upon his premises."

In a Wisconsin case,[16] the court held that

(14) Peters v. Bowman, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. Rep. 113, 598.

(15) 73 Minn. 53, 42 L. R. A. 288, 72 Am. St. Rep. 597, 75 N. W. Rep. 735.

(16) Klix v. Nieman, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. Rep. 223.

the owner of a vacant lot in a city, is under no obligation to fence in a pond on such lot, in which surface water collects, and is not liable for the death of a child falling into it, while at play on the lot. A similar holding was made in Missouri, in a "pond" case.[17]

In the case of Gillespie v. McGowan,[18] the Supreme Court of Pennsylvania in holding that landowner was not liable for an injury caused by a trespassing child falling into an open pond, uses the following vigorous language: "Vacant brick yards and open lots exist on all sides of the city. There are streams and ponds of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it or fill up their ponds and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches."

On the contrary, the Supreme Court of Illinois, in a case where a city was sued for the death of a child by drowning in an unenclosed pond or pit, while admitting that "there are very respectable authorities on the other side of the question," said: "We are unable to see any substantial difference between the turntable cases and the case at bar. Here was a half block of ground in a populous city, bounded on two sides by public streets, and on the third side by a public alley, with an opening of some 40 feet in the fence, upon the street, on the south side, and an opening of equal dimensions in the fence upon the alley on the north side, with a causeway running from one opening to the other diagonally across the premises, inviting approach, and actually used for passage by men and teams. Upon this half block was a dangerous pond or pit, in which the water was always 5 or 6 feet deep, and sometimes 14 feet deep. Logs and timbers floated about in this pond, and boys had for some time been in the habit of playing upon them in the water. The city authorities had been notified of its attractiveness to children, and of its dangerous character. They not only suffered the pond to remain undrained, but the fences around it to be broken down in some places, and to be actually removed in others. The deceased, Frank McMahon, is proven to have entered the premises at the opening in the fence on the alley. * * * The place where he was seen playing in the water was only a few feet from this opening on the public alley. The love of motion, which attracts a child to play upon a revolving turntable, will also attract him to experiment with a floating plank or log which he finds in a pond within his easy reach."[19]

In a late Indiana case,[20] the court is disposed to extend the doctrine of the turntable cases so as to apply to cases in which the injuries are caused by or connected with bodies of water. The plaintiff in that case, a boy about nine years of age, was drowned in a canal owned by the defendant company, while attempting to cross over

(17) Moran v. Pullman Palace Car Co., 134 Mo. 641, 33 L. R. A. 755, 56 Am. St. Rep. 543, 36 S. W. Rep. 659. See also 152 Mo. 183, 48 L. R. A. 291, 75 Am. St. Rep. 447, 53 S. W. Rep. 900. For an able and interesting opinion on this question see Ritz v. Wheeling (W. Va.), 43 L. R. A. 148.

(18) Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365. See also Sullivan v. Huidekoper, 27 App. D. C. 154, 5 L. R. A. (N. S.) 265, and R. R. Co. v. Beavers, 113 Ga. 393, 54 L. R. A. 314.

(19) Pekin v. McMahon, 154 Ill. 141, 27 L. R. A. 206.

(20) Indianapolis Water Co. v. Harold (Ind. App.), 79 N. D. Rep. 542; See also Young v. Harvey, 16 Ind. 314.

the same on a foot log. The complaint averred that the canal and log crossing it, were especially dangerous to children, and that the defendant company had notice of such danger. On appeal to the appellate court from a judgment rendered below, the court in affirming the case, said: "The doctrine is not confined to cases in which the injury complained of is caused by a turntable, but applies to facts coming within its reason." The court quotes from a decision of the Supreme Court of the United States, where that court answered negatively the following excerpt: "In the present case there was no express invitation to the plaintiff to come upon the premises of the railroad company for any purpose, but if the company left its slack pit without a fence around it or anything to give warning of its really dangerous condition, and knew, or had reason to believe, that it was in a place that it would attract the interest or curiosity of passersby, can the plaintiff, a boy of tender years, be regarded as a mere trespasser for whose safety and protection while on the premises in question, against the unseen dangers referred to, the railroad company was under no duty or obligation whatever to make provision?"[21] A decision very similar in fact and argument is found in the reports of the Supreme Court of Kansas.[22]

Although it is difficult to deduce legal propositions upon this mooted question, yet, from a careful and painstaking review of the authorities, *pro* and *con*, the writer believes that the following rules may be said to be the ones based upon better reason and supported by a decided weight of authority.

(a) A railroad company is liable for injuries to trespassing children playing upon its turntables, when the same have been left unlocked and in a public neighborhood where children would reasonably be expected to play. The most logical opinions so holding, are based upon the following grounds and reasons: (1) A turntable is a dangerous machine, created by the act of its owner, it is attractive to children and if publicly located and kept unlocked is a nuisance. (2) It can be easily locked and made safe when not in use. (3) A turntable, existing under the above named conditions, is an inducement and implied invitation to children, and hence when injured thereon, they cannot be treated as voluntary trespassers. (4) Taking into consideration the childish instincts of children, a turntable existing under the above conditions acts as an allurement into a hidden danger or trap.

(b) The doctrine of the turntable cases should not be extended so as to make landowners liable to trespassing children for injuries caused by open ditches, ponds, pits, etc. The following reasons might be advanced: (1) Such objects are open and plain to be seen.[23] (2) They cannot be guarded in many cases without destroying entirely their usefulness, it is usually impracticable to guard them. (3) They are usually natural objects, common to all countries, and the dangers arising therefrom are known and appreciated by all, there is in no sense any allurement into hidden danger.

SUMNER KENNER.

Huntington, Indiana.

(21) Quotation from Union Pac. Ry. Co. v. McDonald, 152 U. S. 267, 14 Sup. Ct. Rep. 619, 38 L. Ed. 435.

(22) Price v. Atchison Water Co., 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. Rep. 450. See also Brinkley Car Works & Mfg. Co. v. Cooper, 60 Ark. 545, 46 Am. St. Rep. 216, 31 S. W. Rep. 154, where a boy was drowned by walking into a pool of hot water, which was covered with pieces of bark and could not be seen—company held liable. In Kinchlow v. Midland Elevator Co., 57 Kan. 374, 46 Pac. Rep. 703, the boy was injured by falling into a barrel of hot water, the top of which was level with the surface, the covering loose. See also Cincinnati,. etc., Co. v. Brown, 32 Ind. App. 58, where corporation was held liable for maintaining a broken down barb wire fence which injured a child at play. See also Bransonis, Adm'r v. Labrot, 81 Ky. 638, 50 Am. Rep. 193.

(23) In some of the cases where the pit was concealed or covered over, the rule would be different. See Penso v. McCormick, 125 Ind. 116, and cases there cited.

CONTEMPT—MISCONDUCT IN PRESENCE OF COURT.

LAMBERSON v. SUPERIOR COURT OF TULARE COUNTY.

Supreme Court of California, June 25, 1907.

An attorney, presenting to the judge in open court a scandalous affidavit in support of an application for a change of judges, commits contempt in the presence of the court, within Code Civ. Proc. sec. 1211, providing that, where a contempt is committed in the presence of the court, it may be punished summarily, etc., notwithstanding section 1209, subd. 12, defining contempt, so that the court may proceed summarily or by citation to show cause, and may allow a showing in defense, extenuation, or mitigation.

A judge is not disqualified from sitting in proceedings to punish an attorney for contempt, based on his presenting to the judge in open court an affidavit attacking the judge's integrity and containing imputations on his motives.

A party after obtaining a new trial on appeal for error in rulings at the trial presented an affidavit in support of an application to change judges. The affidavit declared that the party believed that the judge's rulings were made willfully and corruptly, and that the party believed that the judge knew that such rulings were erroneous, etc. Held, that the affidavit constituted contempt of court on the part of affiant, notwithstanding Code Civ. Proc. sec. 170, subd. 4, authorizing the filing of affidavits in support of a motion for a change of judges on the ground that the party cannot have a fair and impartial trial.

An attorney, who knowingly presents on behalf of his client an affidavit containing averments attacking the integrity of the judge and containing defamatory matter, is guilty of contempt.

HENSHAW, J.: Petitioner was and is the attorney at law of John Bashore, who is plaintiff in two actions pending before the superior court of Tulare county. John Bashore made application for a change of judges in these actions, supporting his application by his own affidavits, verified before petitioner as notary public, and by petitioner filed with and presented to the court. Two of these affidavits were filed in connection with separate applications for change of judges in one of the cases, while the third was presented in support of the application for a change of judges in the other case. Both actions are still pending. The first two applications were met with counter affidavits and denied. The third affidavit contained substantially all of the alleged defamatory and contemptuous matter embodied in the preceding affidavits and went even further in attacking the integrity of the judge. Upon presentation of this last affidavit, the judge, believing that he could not with self-respect longer sit at the hearing of these causes, announced that John Bashore could have a change of judges in any case pending in his court, whether theretofore denied or not, upon application and without the filing of any affidavit. He then issued a citation to petitioner to show cause why he should not, as the attorney for John Bashore, and as an officer of the court who had presented these scandalous affidavits, be punished for contempt in so doing. This citation to show cause set forth at length the proceedings had in the matter and the language of the affidavits which the court regarded as unwarranted, contemptuous, and deliberately designed to bring into disrepute himself, as judge, and the court over which he presided. Petitioner then applied for and obtained from the district court of appeal an alternative writ of prohibition. The questions involved were considered by that tribunal, and, upon disagreement of the judges, the proceedings were certified to this court.

Dealing first with the questions of procedure which petitioner presents this contempt (assuming for the moment that a contempt was actually committed) was one which took place in the immediate view and presence of the court, and the citation to show cause, which was timely made, did not require an affidavit to support it. The second and third affidavits were filed and presented to the judge in open court. In McCormick v. Sheridan, (Cal.), 20 Pac. Rep. 24, an attorney had presented to this court a petition for a rehearing, whose language reflected upon an opinion written by one of the commissioners. Some days thereafter, when the matter of the petition had come under review, an order was issued from this court, which order was in fact a citation directed to the offending attorney, and commanding his presence to show cause why he should not be punished for contempt. A hearing was had, and this court declared: "Upon the facts contained in the petition for rehearing, and quoted above, we adjudge the respondent Waterman guilty of contempt, committed in the face of the court." In re Foote, 76 Cal. 543, 18 Pac. Rep. 678, declares merely that in contempt proceedings, which contempt consisted of contumelious language addressed to the judge in the trial of a cause, an order adjudging an attorney in contempt made 50 days thereafter and in his absence, and without citation or notice to him of any kind, was improper, upon the ground that by its laches the court had lost jurisdiction. It is not in conflict with the rule and procedure applied in McCormick v. Sheridan, and, if it were, McCormick v. Sheridan is the latest expression of this court upon the matter. McCormick v. Sheridan, moreover, is in full accord with the views of the Supreme Court of the United States expressed in Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. Ed. 405, where it is said: "Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court, and was neither surrendered nor lost by delay on the part of the circuit court in exercising its power to proceed. It was within the discretion of the court whose dignity he had insulted, and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed at once to punish him, or postpone action until he was ar-

rested upon process, brought back into its presence, and permitted to make defense." In People v. Barrett, 121 N. Y. 678, 24 N. E. Rep. 1095, the respondent had secreted himself in the jury room while the jury were deliberating, and had taken notes of their proceedings. He was discovered and afterwards charged with having committed a contempt of court. By the supreme court, People v. Barrett, 56 Hun. 351, 9 N. Y. Supp. 321, it was held that it was a contempt committed in the immediate view and presence of the court, and the court of appeals affirmed this determination. In Hughes v. People, 5 Colo. 436, an affidavit for a change of judges was presented to the court while in session by respondent's attorney, respondent, himself an attorney, being absent. The affidavit was brought before the court by attachment, and the supreme court declared: "It was in the face of the court, and warranted the judge in taking cognizance of it summarily as though the words, instead of being written or read in court, had been spoken in facie curiae." The contempt being one committed in the presence of the court required no supporting affidavit. Code Civ. Proc. § 1211. The court could have proceeded upon it summarily, or by citation to show cause—the course here adopted—and could have allowed a showing in defense extenuation, or mitigation. Nor is this matter in any wise controlled by subdivision 12 of section 1209, Code of Civil Procedure. While conceding to the legislature the fullest power in the matter of contempts to lay down rules of procedure, we repeat what was said in Re Shortridge, 99 Cal. 526, 34 Pac. Rep. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78: "No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act, whether committed in or out of its presence, which tends to impede, embarrass, or obstruct the court in the discharge of its duties. It is a doctrine which is admitted in all its rigor by American courts everywhere, and does not need the support of foreign authorities, based upon the fiction that the majesty of the King, represented in the persons of the judges, is always present in the court. It is founded upon the principle, which is coeval with the existence of the courts, and as necessary as the right of self-protection, that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence. It exists independent of statute. The legislative department may regulate the procedure and enlarge the power, but it cannot, without trenching upon the constitutional powers of the court, * * * fetter the power itself."

Nor is the judge disqualified from sitting in the contempt proceedings. Petitioner's theory in this regard, if we understand it, is that the judge is disqualified from hearing the proceedings in contempt, because the contempt itself consists in imputations upon his motives, and attacks upon his integrity. Such is not and never has been the law. The position of a judge in such a case is undoubtedly a most delicate one, but his duty is none the less plain, and that duty commands that he shall proceed. However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides. As was said by the chief justice of this court in Re Philbrook, 105 Cal. 471, 38 Pac. Rep. 511, 884, 45 Am. St. Rep. 59: "The law which in such cases makes us the judges of offenses against the court places us in an extremely delicate and invidious position, but it leaves us no alternative except to allow the court and the people of the state, in whose name and by whose authority it acts, to be insulted with impunity, or to exercise the authority conferred by law for the purpose of compelling attorneys to maintain the respect due to courts of justice and judicial officers." Were the rule otherwise so that it was required that another julge should be called in to sit in the proceeding, the recalcitrant and offending party would need only to insult each judicial officer in turn until the list was exhausted, and thus, by making a farce of legal procedure, go scathless and unpunished.

Coming, now, to the facts constituting the alleged contempt, it appears that John Bashore is a man about 70 years of age, who has been an invalid for more than 20 years, has been partially deaf for several years, and whose wife attended to and conducted all of his business transactions, while he remained upon the ranch where they lived, some miles from Visalia; that he prosecuted an action to recover certain properties which had been sold under execution. The cause was tried before a jury, resulting in a verdict and judgment adverse to him, and upon his appeal to this court a new trial was ordered for certain errors in the admission of evidence and in the giving of instructions. Bashore v. Parker, 146 Cal. 525, 80 Pac. Rep. 707. The affidavit in support of the application for a change of judges, with other impertinent and defamatory matter, declares as follows: "Which said rulings upon the admission of such evidence this affiant believes and alleges was done willfully and corruptly and for the purpose of preventing this affiant from having a fair and impartial trial of said action; and affiant believes that said Hon. W. B. Wallace is a sufficiently good judge of law to know that the said rulings so made by him, and such instructions given to said jury in said action, were erroneous, and such rulings and instructions were not the law of said case; and this affiant believes that said instructions were so given and such rulings made with a full knowledge on the part of said judge that they were erroneous at the time they were given and made. And this affiant believes that the dislike and hatred of said W. B. Wallace, judge, as aforesaid, is so great that he would willfully make unlawful rulings in the trial of this action against this affiant, and that he would find all matters of fact against this affiant, whether there was any evidence to sustain such findings or not, and that he would not give the testimony of this affiant, or the witnesses produced by him upon the trial of said action, any credit whatever as against any witness of any kind or character that might be produced upon the side of the defend-

ant in said action." This application for change of judges is founded upon subdivision 4 of section 170 of the Code of Civil Procedure, the provision of which is simply that, "when it appears from the affidavits on file that either party cannot have a fair and impartial trial before any judge or court of record about to try the case by reason of the prejudice or bias of such judge, said judge shall forthwith secure the services of some other judge of the same or some other county." It must need little consideration to show that the language above quoted, as addressed to the law, is flagrantly and willfully contemptuous. It states the mere belief of Bashore, without any supporting fact, as in Morehouse v. Morehouse, 106 Cal. 332, 68 Pac. Rep. 976, unless it can be said that the fact that the judge fell into error upon the first trial of the case is sufficient to justify the imputation of a corrupt intent—an argument too preposterous to merit even enunciation. But, outside of this circumstance, the whole declaration is but the purported belief of this aged invalid, with no attempt to state even the source of his information or origin of that belief. It cannot impress the unprejudiced mind as being other than a deliberate intent to insult and defame the judge. Let it be understood that we are not here declaring that if a judge has in fact indulged in corrupt practices, or has in fact given a ruling or decision through a corrupt motive, that those facts may not be stated. They may be. And they would be prepotent evidence of bias and prejudice. But it may not for one moment be countenanced that, without supporting facts, lawyer or litigant may wantonly charge a judge with corrupt and improper motives, and seek protection from the just consequences of such outrage under the shield of the Code provision. McCormick v. Sheridan (Cal.), 20 Pac. Rep. 24; In re Philbrook, 105 Cal. 471, 38 Pac. Rep. 511, 884, 45 Am. St. Rep. 59; People v. Brown, 30 Pac. Rep. 338, 17 Colo. 431; In re Mains, 80 N. W. Rep. 714, 121 Mich. 603; Hughes v. People, 5 Colo. 436; In re Snow, 75 Pac. Rep. 740, 27 Utah, 265; Harrison v. State, 35 Ark. 458; In re Pryor, 18 Kan. 72, 26 Am. Rep. 747. So, while it is true that matters which are pertinent to the consideration and which are charged as facts are admissible, without reference to their effect upon the reputation of the judge, or of any one else, it is equally true that neither attorney nor litigant has any right to present such degrading accusations under the guise of mere belief, without the aid of a single supporting fact. May v. Ball (Ky.), 67 S. W. Rep. 257.

Indisputably, therefore, John Bashore, upon the face of this record, was guilty of contempt committed in the immediate presence of the court. Is his attorney, who presumptively prepared, and who certainly presented to the court, this affidavit, any less guilty? As the case now stands, we think not. Under his oath to maintain the respect due to courts, every attorney stands responsible, not only for his own individual conduct in court, but for every paper which, knowingly, he presents on behalf of his client. As the matter is here before us the petitioner knowingly presented this affidavit on behalf of his client, and for this he is equally culpable with his client. Defenses are open to him, and he may exonerate himself upon the hearing from intentional wrongdoing, if the facts warrant, but no doubt can be entertained of the jurisdiction of the court, under the circumstances shown, to proceed with that hearing.

The writ is discharged.

Note.—An attorney who files objectionable papers may be guilty of contempt, and the judge whose motives or integrity is impugned or assailed is not disqualified from sitting in the proceedings.—It was held in the principal case that an attorney, under his oath to maintain the respect due to courts, stands responsible, not only for his own individual conduct in court, but for every paper which, knowingly, he presents on behalf of his client. This doctrine is in line with the prevailing opinion of the courts upon this question, and is a product of the common law. In re Philbrook, 105 Cal. 471; McCormick v. Sherridan (Cal.), 20 Pac. Rep. 24; May v. Ball, 24 Ky. 241, 67 S. W. Rep. 257; People v. Brown, 17 Colo. 431, 30 Pac. Rep. 338; Brown v. Brown, 4 Ind. 627; In re Mains, 8 N. Y. 714; Matter of Elsam, 3 B. & C. 597; Hoskins v. Barkley, 4 T. R. 402; Smith v. R. R. Co., 29 Ind. 546; Smith v. Brown, 3 Tex. 360; Harrison v. State, 35 Ark. 458; In re Gates, 17 W. N. C., Pa. 142. A contempt consists as well in the manner of the person committing it as in the subject matter of its foundation. Matters which, if true, would in their very nature be scandalous, may be presented, hinted at, or brought to the attention of the court in so respectful a manner, that no judge would ever think to construe a contempt therefrom; while on the other hand, under the guise and pretense of setting out privileged and necessary matter, scandalous and insulting charges and inuendoes may be made upon pretended information and belief, in a manner that would hear the unmistakable earmarks of malice and deliberate contempt. This principle applies not only to the attorney's speech addressed directly to the court, but to the language employed by him in the papers filed in court. The attorney must, both as an officer of the court, and as a law abiding citizen, judge whether it is ever necessary to use language or exhibit conduct which a discriminating judge would regard as a contempt. Hughes v. People, 5 Colo. 436. The enforcement and protecting of public and private rights depends, in a great measure, upon the independence of the bar being upheld and maintained on one hand, and the respect and dignity of the court on the other. No person of good name would ever aspire to become a member of a court if he is to be falsely and wantonly villified or slandered by attorneys who are an integral part of the judicial machinery, and no reputable attorney would care to practice before a court so far forgetting the respect it owes to itself and its duty to the public, as to permit such an offense to go unpunished. In re Snow, 27 Utah, 265, 75 Pac. Rep. 740; Harrison v. State, 35 Ark. 458. The independence of the legal profession, however, carries with it the right to freely challenge, criticise, and condemn all matters and things under review and in evidence. But with this privilege goes the corresponding obligation of constant courtesy and respect toward the tribunal in which the pro-

ceedings are pending. In re Pryor, 18 Kan. 72.

Although the act or thing constituting the contempt may be in large part against the judge, individually, this fact will not disqualify him from sitting in the proceedings in contempt, as held in the principal case. It is not necessarily the attack upon the judge that constitutes the offense for which the offending party is liable as for a contempt of court. The offense may consist, primarily, of the insult which the objectionable act or thing offers to the dignity of the court. And it may also consist of the tendency of the act or thing in preventing a fair trial of the particular cause while yet pending in court. Myers v. State, 46 Ohio St. 473, 22 N. E. Rep. 45; Johnson vs. State, 31 Tex. Cr. R. 456. It is the duty of the judge to maintain and protect the dignity of the court, however willing he may be to forego the punishment of the person committing the offense. Cooper v. Poole, 13 Colo. 337, 373, 22 Pac. Rep. 800.

It is generally held that statutory proceedings relating to a change of venue have no application to proceedings to punish contempts unless such proceedings are expressly included eo nomine in the written law. Rapalje on Contempt, sect. 110. The provisions of statutes relating to change of venue are rendered inapplicable by two well known rules of the common law, viz: (a) every court is the exclusive judge of contempts committed in its presence, and (b) no court can punish a contempt of another court. Rapalje, Id.

When considering a provision of the legislature for a change of judges, the Supreme Court of Montana said: "We are of the opinion that this section cannot be made applicable to contempt proceedings without materially interfering with the power of these courts, and in the absence of an express declaration to the contrary we prefer to believe that the legislature did not intend unnecessarily to invade the province of a co-ordinate branch of the state government and therefore did not have contempt proceedings in contemplation when passing the act." State v. Clancy, (Mont.), 76 Pac. Rep. 10.

The Supreme Court of Colorado, when considering a similar statutory provision, declared that "the defendant in contempt proceeding has no right to demand a hearing before another judge." Bloom v. People, 23 Colo. 416, 48 Pac. Rep. 519. On the other hand, it has been held that a proceeding to punish for a contempt is a "cause or matter" within a statute allowing the removal of a cause or matter from a judge who may be interested, etc. Lamonte vs. Ward, 36 Wis. 558. See State v. Court, 53 Minn. 283; Penn. v. Messenger, 1 Yeates, Pa. 2; Ex parte Haley, 99 Mo. 150.

The power to punish for contempt is not statutory but is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. This doctrine is universally admitted in the American courts. It is, as was held in the principal case, a necessary incident to the execution of the powers conferred upon the courts. Ex parte Terry, 128 U. S. 289; Easton v. State, 39 Ala. 551; Neil v. State, 9 Ark. 263; People v. Stapleton, 18 Colo. 568; People v. Wilson, 64 Ill. 195; Baldwin v. State, 128 Ind. 31; Cartwright's case, 114 Mass. 230; Langdon v. Wayne, 76 Mich. 356; Yates v. Lansing, 9 Johns. N. Y. 395; Williamson's case, 26 Pa. St. 9; State v. Frew, 24 W. Va. 416; 4 Bl. Com. 286. At common law, every court of competent jurisdiction was the exclusive judge of contempts committed in its presence or against its process. "The sole adjudication for contempt," said Mr. Justice Blackstone, "and the punishment thereof, belongs exclusively and without interference to each respective court." Crosby's Case, 3 Wils. 188. And this is the doctrine of universal application in the courts of this country in the present day. U. S. v. Berry, 24 Fed. Rep. 780; Kirk v. Milwaukee, etc., 26 Fed. Rep. 501; In re Litsfield, 13 Fed. Rep. 863; State v. Ryan, 182 Mo. 345; Heinz v. Butte, etc. Co., 129 Fed. Rep. 274; In re Chetwood, 165 U. S. 443; Easton v. State, 39 Ala. 551; Ex parte Crittenden, 62 Cal. 534; Bloom v. People, 23 Colo. 416; Ex parte Edwards, 11 Fla. 174; Clarke v. People, 11 Ill. 340; Church v. Muscatine, 2 Ia. 69; State v. Judge, 31 La. 116; Shattuck v. State, 51 Miss. 50; Phillip v. Welch, 11 Nev. 187; State v. Towle, 42 N. H. 540; Ex parte Martin, 2 Yerg., Tenn. 546; Craw v. State, 24 Tex. 12; People v. Owens, 8 Utah 20; Vilas v. Burton, 27 Vt. 56, and the exercise of this power cannot, it is held, be raised on error. (See cases last above cited.) Courts, however, must have jurisdiction, not only over the person and the matter, and the organic power to render the judgment, but the act or default charged must in law constitute a contempt, else the judgment of the committing court will be a nullity. Ex parte Rowland, 104 U. S. 604; Ex parte Harvey, 68 Ala. 303; Wyatt v. People, 17 Colo. 252; People v. Pirfenbrink, 96 Ill. 68; Com v. Sumner, 5 Pick., Mass. 360; People v. Liscomb, 60 N. Y. 559.

HUMOR OF THE LAW.

"What!" said the judge. "You expect me to send your husband to prison when you acknowledge that you threw five flatirons at him and he only threw one at you?"

"Yes; that's all right, judge," said the irate woman, "but, then, the one he threw hit me."

In practice.—Admiring Friend: I see that you are now practicing law.

Frank Fledgling: No sir, I appear to be practicing law, but I am really practicing economy.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Abatement and Revival**—Another Action Pending.—The pendency of a suit in a state court to obtain a judgment in personam is not a bar to the institution and prosecution of a suit in a federal court involving the same subject-matter.—Weir v. Winnett, U. S. C. C., D. Neb., 155 Fed. Rep. 824.

2. **Accident Insurance**—Bite of Dog.—The bite of a dog is an accident and should be classed under the "accident provisions" of an accident insurance policy.—Farner v. Massachusetts Mut. Act. Ass'n, Pa., 67 Atl. Rep. 927.

3. **Accord and Satisfaction**—Necessity of Execution.—An agreement by a creditor to receive less than the amount of his debt cannot be pleaded as an accord and satisfaction, unless actually executed.—Bowen v. E. A. Waxelbaum & Bro., Ga., 58 S. E. Rep. 784.

4. **Account**—Right of Accounting.—Where plaintiff knows the exact amount due him on a simple account, he is not entitled to an accounting, since he has an adequate remedy in an action for a money judgment at law.—Donovan v. McDevitt, Mont., 92 Pac. Rep. 49.

5. **Action**—Joinder of Causes.—The action for unlawful detainer is not a common-law action, and, in the absence of statutory provisions therefor, a demand for damages or rent cannot be joined in an action for possession of the premises.—Mackenzie v. Porter, Colo., 91 Pac. Rep. 916.

6. **Adverse Possession**—Requisites.—One may claim adversely though he knows his title is defective, but his possession must be under claim of right or title.—McDaniel v. Sloss Iron & Steel Co., Ala., 44 So. Rep. 705.

7.——Taking of Adverse Possession.—One who enters and incloses land beyond his true line is in possession of his inclosed boundary; and it is not necessary that possession should be held under color of title to render it transferable.—Walling v. Eggers, Ky., 104 S. W. Rep. 360.

8. **Appeal and Error**—Agreed Statement of Facts.—Where a case was submitted to the trial court on the pleadings and an agreed statement of facts, there was no necessity for a motion for a new trial to justify a review.—Board of Com'rs of Garfield County v. Porter, Okla., 92 Pac. Rep. 152.

9.——Dismissal.—Where under the law an appeal taken should have been made returnable to the next ensuing term of the appellate court after its entry but instead was made returnable to the second term of such court thereafter, the appeal will be dismissed.—Lowe v. Delaney, Fla., 44 So. Rep. 710.

10.——Insufficient Presentation of Error.—The supreme court will not review a ruling in excluding testimony, unless the party offering it informed the court what he expected to prove, and made the offer a part of the record, so the court might judge of its materiality.—Chlopeck v. Chlopeck, Wash., 91 Pac. Rep. 966.

11.——Judgment and Findings.—Where an appeal is presented upon the pleadings, findings, and judgment, the only question for decision is whether the findings of law can be sustained upon the facts as found.—Stewart v. Stewart, Cal., 92 Pac. Rep. 87.

12.——Parties to Appeal.—A second appeal will lie by defendants not parties to the first appeal to bring up proceedings subsequent to the mandate on remittitur to correct errors of the lower court in entering decree on the mandate.—Powell v. Yearance, N. J., 67 Atl. Rep. 892.

13.——Questions Considered.—The denial of a motion to strike certain interrogatories, and the answers thereto, will not be considered on appeal where the granting of the motion could not have affected the result.—State v. Co-operative Homebuilders, Wash, 91 Pac. Rep. 953.

14.——Sufficiency of Evidence to Support Verdict.—A verdict and judgment, which is absolutely without any evidence to support it, is erroneous as matter of law, and the Supreme Court upon proper exceptions may grant a new trial for such error.—Gunter v. Fallaw, S. C., 59 S. E. Rep. 70.

15. **Appearance**—Special Appearance.—Defendant not having made a special appearance before a justice, held he could not after judgment there enter such an appearance by his appeal to the superior court.—Allen-Fleming Co. v. Southern Ry. Co., N. C., 58 S. E. Rep. 793.

16. **Arbitration and Award**—Waive of Objections.—A party to an arbitration agreement who voluntarily joins in the selection of persons as arbitrators who are known to have formed opinions upon the merits of the controversy cannot impeach the award on the ground that the arbitrators were not impartial.—Duvall v. Culzner, U. S. C. C., N. D. Pa., 155 Fed. Rep. 910.

17. **Bail**—Jurisdiction of Supreme Court.—The supreme court will not entertain an application for bail or reduce bail until all remedies have been exhausted below in the criminal court.—State v. Reed, La., 44 So. Rep. 705.

18. **Bankruptcy**—Contempt.—The giving of false, vague and evasive testimony by an alleged bankrupt on his examination before a special commissioner, with the intention of misleading the court and concealing assets of his estate, is a misbehavior, and constitutes a contempt which the district court has power to punish on a summary hearing without a jury.—Ex parte Bick, U. S. C. C., S. D., N. Y., 155 Fed. Rep. 908.

19.——Interference with Receiver in Bankruptcy.—A city marshal who seized and removed property in possession of a receiver in bankruptcy, acting under a writ of replevin after being notified of the receivership and the issuance of an order of injunction, adjudged guilty of contempt.—In re Wilk, U S. D. C., S. D., N. Y., 155 Fed. Rep. 943.

20.——Reclamation of Property by Seller.—Circumstances under which a court of equity might permit a rescission of a contract of sale on the ground of mistake where the parties could be restored to their original position may not warrant such relief after the purchaser has become bankrupt, and especially where the specific property purchased cannot be restored.—In re American Knit Goods Mfg. Co., U. S. D. C., E. D. N. Y., 155 Fed. Rep. 906.

21.——Removal of Trustee for Misconduct.—A trustee removed for cause held not entitled to the allowance of his personal expenses or commissions on the ground of willful misconduct.—In re Leverton, U. S. D. C., M. D. Pa., 155 Fed. Rep. 931.

22.——Sale of Chattel Mortgages.—Sale of mortgaged chattels by bankrupt after filing of

petition and before adjudication held avoidable at the election of trustee.—Hamilton v. Smith, Mont., 92 Pac. Rep. 32.

23. **Bills and Notes**—Consideration.—Where a benefit is conferred by a third party or a detriment suffered by the payee of a note at the instance of the maker thereof, it will be sufficient consideration to support the note.—Doxy v. Exchange Bank of Perry, Okla., 92 Pac. Rep. 150.

24.——Fraud.—A debtor who gives his note for a subsisting debt, induced to do so by statements of the creditor, cannot set up as a defense that such statements were false, without also showing injury.—Bowen v E. A. Waxelbaum & Bro., Ga., 58 S. E. Rep. 784.

25.——Parties.—One who signs in form and appearance as a principal and maker of a note is bound as such to all persons who subsequently deal with the paper without knowledge of his true relation to it.—Citizens' Nat. Bank v. Burch, N. C., 59 S. E. Rep. 71.

26.——Release of Indorsers.—Agreement to extend time to one of several indorsers on note if he would pay same held not to release other indorsers where due notice of protest was given. —First Nat. Bank v. Diehl, Pa., 67 Atl. Rep. 897.

27. **Brokers**—Commissions.—One procuring a corporation in which he is a stockholder to purchase real estate of another is not entitled to commission from the latter.—Steele v. Lawyer, Wash., 91 Pac. Rep. 958.

28. **Carriers**—Lien for Freight.—The last of several connecting carriers has a lien for freight which he has paid to successive carriers, even when the goods have been forwarded over the wrong line and to the wrong place.—Andrus v. Columbia & Okanogan Steamboat Co., Wash., 92 Pac. Rep. 128.

29.——Live Stock Shipment.—A carrier of live stock, by special contract, can be released from liability for injuries to stock arising from named causes, and stipulate liability only in the event of gross negligence.—George, Southern & Florida Ry. Co. v. Greer, Ga., 58 S. E. Rep. 782.

30.——Regulation.—The North Carolina railroad commission being required by Revisal 1905, sec. 1106, to make railroad rates subject only to the limitation prescribed by Laws N. C. 1907, p. 252, c. 217, held necessary parties to a suit to restrain the enforcement of such chapter for unconstitutionality.—Southern Ry. Co. v. McNeill, U. S. C. C., D. N. Car., 155 Fed. Rep. 756.

31. **Chattel Mortgages**—Transfer of Property.—Where mortgagor and mortgagee transfer chattels to a corporation, rights acquired from the mortgagee held merged in the title acquired from the mortgagor.—Hamilton v. Smith, Mont., 92 Pac. Rep. 32.

32. **Constitutional Law**—Foreign Corporations.—Where foreign corporations have purchased and leased domestic railroads on the faith of the statement of the state, the state cannot prevent such corporation from doing domestic business in the state.—Seaboard Air Line Ry. Co. v. Railroad Commission of Alabama, U. S. C. C., M. D. Ala., 155 Fed. Rep. 792.

33. **Corporations**—Street Sprinkling.—A statute authorizing a municipal corporation to assess the cost of street sprinkling on abutting property in proportion to frontage, without reference to the question of benefits to be derived, is invalid.—Stevens v. City of Port Huron, Mich., 113 N. W. Rep. 291.

34.——Subscription to Stock.—A subscription by a number of persons to the stock of a corporation to be thereafter formed is a continuing offer to the proposed corporation, which, on acceptance by it, becomes binding.—Nebraska Chicory Co. v. Lednicky, Neb., 113 N. W. Rep. 245.

35. **Contracts**—Sewer Contract.—A contract for the construction of a sewer, if within the power of a city, was not void for failure of the city to condemn portions of the premises over which the sewer was constructed.—Bell v. Kirkland, Minn., 113 N. W. Rep. 271.

36. **Corporations** — Carrying on Business Within State.—The legislature has the power to prescribe the terms on which foreign corporations may come into the state, and may pass statutes for the protection of its own citizens doing business with them.—Williams v. Mutual Reserve Fund Life Ass'n, N. Car., 58 S. E. Rep. 802.

37.——Equal Protection of Law.—Const. Ala. 1901, sec. 240, giving corporations right to sue, held to prohibit any court from giving effect to an enactment providing that the bringing of a suit by a foreign corporation in the federal court shall ipso facto forfeit its right to do domestic business in the state.—Seaboard Air Line Ry. Co. v. Railroad Commission of Alabama, U. S. C. C., M. D. Ala., 155 Fed. Rep. 792.

38.——Transfer of Assets.—Where a corporation transfers its assets, leaving debts unpaid, the purchaser having notice of the facts takes the property subject to an equitable lien in favor of the creditors of the corporation.—Clevenger v. Galloway & Garrison, Tex., 104 S. W. Rep. 914.

39. **Courts**—Jurisdiction and Relief.—A circuit court of the United States has no appellate jurisdiction over a district court, and cannot review its proceedings for any error or irregularity on petition for a writ of habeas corpus where the district court had jurisdiction.—Ex parte Bick, U. S. C. C., S. D. N. Y., 155 Fed. Rep. 908.

40.——Limitations Imposed by Legislature.—The legislature may limit the right of litigants to resort to the constitutional jurisdiction of the supreme court, and regulate the method, so long as it does not unreasonably interfere with or embarrass the court's ultimate revisory powers.—Memphis St. Ry. Co. v. Byrne, Tenn., 104 S. W. Rep. 460.

41.——Public Lands.—A state court held to have no jurisdiction to enjoin defendant from proceeding to obtain title to public lands, and to require him to file a relinquishment of his claims thereto.—Columbia Canal Co. v. Benham, Wash., 91 Pac. Rep. 961.

42. **Criminal Evidence**—Admissibility.—It is error to place accused's paramour on the stand, and obtain from her a refusal to testify on the ground of privilege.—Garland v. State, Tex., 104 S. W. Rep. 898.

43.——Personal Identity.—A witness may be permitted to identify an accused person solely from having heard his voice, and such evidence is not a statement of mere matter of opinion, nor is it to be considered as circumstantial.—Mack v. State, Fla., 44 So. Rep. 706.

44. **Criminal Law**—Arrest Under Direction of

Superior Officer.—An officer acting under direction of his superior, who is present, held justified in assisting in an arrest without a warrant for an offense committed in the presence of the superior officer but not of himself. —People v. Craig, Cal., 91 Pac. Rep. 997.

45. **Criminal Trial**—Correction of Sealed Verdict.—Where a jury bring in a sealed verdict, which is defective because it does not name the particular defendants found guilty, and the court orders them to retire and correct their verdict by inserting such names and they do so, there is no reversible error.—Steudle v. Territory, Okl., 91 Pac. Rep. 1024.

46.——Questions by Court.—Though it is counsel's province to question witnesses, the court may reiterate a question in order to understand the witness, or have the witness explain his meaning.—Elsworth v. State, Tex., 104 S. W. Rep. 903.

47. **Death**—Contributory Negligence of Parent.—A father of a child whom he left in its mother's care, and who was killed by its mother's negligence, held precluded from recovering in an action for its death brought by him as administrator for his sole benefit.—Vinnette v. Northern Pac. Ry. Co., Wash., 91 Pac. Rep. 975.

48. **Descent and Distribution**—Line of Descent.—Where N.'s brother and sister survived their father and died seized of certain land descending to them from their father's estate, N.'s interest in the land which descended to the brother and sister descended to her as their heir, and not as the heir of her father.—West v. Hermann, Tex., 104 S. W. Rep. 428.

49.——Standing Timber.—A conveyance of standing timber held to create a determinable fee in realty, which passes on the death of the grantee to his heirs, subject to the dower interest of the widow.—Midyette v. Grubbs, N. Car., 58 S. E. Rep. 795.

50. **Divorce**—Living Apart for Five Years.—A divorce will be granted on the statutory ground of "living apart without any cohabitation for five consecutive years next before the application," no matter which party was in fault.—Parker v. Parker, Ky., 104 S. W. Rep. 1028.

51. **Dower**—Standing Timber.—A conveyance of standing timber held to create a determinable fee in realty which passes on the death of the grantee to his heirs, subject to the dower interest of the widow.—Midyette v. Grubbs, N. Car., 58 S. E. Rep. 795.

52. **Easements**—Obstructions.—Where land is conveyed subject to a right of why, neither party can do any act interfering with the rightful use of the same by the parties to the deed.—Hale v. Jenkins, 106 N. Y. Supp. 282.

53. **Electricity**—Contributory Negligence.—A traveler on the highway who receives a fatal shock in trying to raise a wire of an electric power company which was down held guilty of contributory negligence.—Shade v. Bay Counties Power Co., Cal., 92 Pac. Rep. 62.

54. **Eminent Domain**—Compensation.—Comp. St. 1897, c. 12a, sec. 101b, providing for the payment for property appropriated for parks, parkways, and boulevards, is not exclusive, but there is a general liability against a municipality for such payment and together they provide a safe and adequate fund.—State v. Several Parcels of Land, Neb., 113 N. W. Rep. 248.

55.——Flooding Lands.—Where the flooding of lands outside the limits of those condemned by a railroad company is the natural result of a change of the course of a stream in the construction of the road, there may be a recovery. —Line v. Philadelphia, H. & P. R. Co., Pa., 67 Atl. Rep. 899.

56.——Proceedings to Assess Damages.—In a proceeding to assess damages to abutting property by a change of street grade, the court properly refused to charge that the city could not grant any person an exclusive franchise for the use of any street or part of a street.— In re Jackson St. in City of Seattle, Wash., 91 Pac. Rep. 970.

57. **Equity**—Laches.—A delay of two years in bringing suit to recover mining stock alleged to have been fraudulently acquired by defendant held not to constitute such laches as would bar the suit because of an increase in the value of the stock not shown to have been due to any action or expenditure of defendant.—Brissel v. Knapp, U. S. C. C., D. Nevada, 155 Fed. Rep. 809.

58. **Estoppel**—Inconsistent Claims.—That a stockholder took an assignment of a certificate of sale of corporate property under an execution held not to prevent him and other minority stockholders from assailing the validity of another judgment against the corporation.— Paxton v. Heron, Colo., 92 Pac. Rep. 15.

59. **Evidence**—Meaning of Words.—The rule with reference to mutual standards in the construction of ambiguous words and clauses in contracts is subject to the modification that an unambiguous writing will not be overthrown by resort to parol proof of intent.—West v. Hermann, Tex., 104 S. W. Rep. 428.

60.——Notice to Produce Secondary Evidence. —Where a paper is in the possession of a party, the adverse party should before trial notify the party to produce it or procure a rule for its production, and where the paper is not then produced, or it is shown to be lost, secondary evidence is admissible.—Mussellam v. Cincinnati, N. O. & T. P. Co., Ky., 104 S. W. Rep. 337.

61. **Exchange of Property**—Performance.— The fact that through the collusion of a grantee and others a certain trust deed was placed upon property conveyed to him held not to release him from his contract to purchase.— McKennan v. Mickelberry, Ill., 81 N. E. Rep. 1072.

62. **Executors and Administrators**—Defenses to Claim.—Where one attempts to establish a claim as creditor of an estate, the administrator must interpose every available defense, including the statute of limitations.—In re Van Voorhees' Estate, 100 N. Y. Supp. 354.

63.——Final Accounting.—The obligation of one appointed executor and testamentary trustee to act as executor held to remain, empowering the county court to direct him to render a final account.—In re Roach's Estate, Or., 92 Pac. Rep. 118.

64.——Management of Estate.—An executor investing trust funds is not an insurer, but he must exercise the degree of discretion which an intelligent person of ordinary prudence would observe in the management of his own

affairs.—In re Roach's Estate, Or., 92 Pac. Rep. 118.

65. **False Imprisonment**—Malice.—An instruction that if defendant, a police judge, and T., wrongfully and maliciously conspired to have plaintiff arrested, and pursuant thereto caused his arrest in order to annoy him, defendant was liable for the injury sustained, held proper.—Read v. Shipley, Ky., 104 S. W. Rep. 1001.

66. **Frauds, Statute of**—Oral Agreements as to Boundaries.—An oral agreement of adjoining landowners to exchange certain parcels so that a diagonal road should be the boundary line held not effective where the true line was known.—Mann v. Mann, Cal., 91 Pac. Rep. 994.

67. **Gifts**—Causa Mortis.—A gift causa mortis is one by a sick person who, apprehending his dissolution, delivers or causes to be delivered to another the possession of any personal goods to keep as his own in case of the donor's death.—McCoy's Adm'r v. McCoy, Ky., 104 S. W. Rep. 1031.

68. **Habeas Corpus**—Grounds for Writ.—By the common law, if the court has authority to render judgment imprisoning the accused, the error is judicial, remediable by a writ of error; but if the court has no such authority the error is jurisdictional, remediable by writ of habeas corpus.—Servonitz v. State, Wis., 113 N. W. Rep. 277.

69.——Revocation of Conditional Pardon.—Where a conditional pardon was revoked by the governor, the court in a habeas corpus proceeding was authorized to place the burden of proving breach of the conditions on the state.—Spencer v. Kees, Wash., 91 Pac. Rep. 963.

70. **Hawkers and Peddlers**—Licenses.—The subclassification of hawkers or peddlers, according to the particular method adopted of reaching customers, rendering one class likely to reach more than another and to do a greater amount of business, is legitimate, both as to police regulations and occupation taxes.—Servonitz v. State, Wis., 113 N. W. Rep. 277.

71. **Homestead**—Rights of Surviving Wife and Children.—The fact that a widow has lost the right to recover her portion of the rents of the homestead of her deceased husband, either through laches or limitations, does not vest the right to recover such rents in the children until they have recovered possession of the homestead from the adverse holder.—Stubbs v. Pitts, Ark., 104 S. W. Rep. 1110.

72. **Homicide**—Justifiable Homicide. — The mere placing of his hand by decedent on a post not for the purpose of destroying the fence, but to pull it down to make a gap through which to drive his cattle held not a felony within Mansf. Dig. sec. 1665 (Ind. T. Ann. St. 1899, sec. 1008), justifying a killing under section 1547, Mansf. Dig. (Ind. T. Ann. St. 1899, sec. 890).—Driggers v. United States, Ind. T., 104 S. W. Rep. 1166.

73.——Threats of Decedent.—Threats against accused by decedent are not admissible on the issue of self defense, where the undisputed evidence shows the decedent was not the aggressor at the time he was killed.—Black v. State Ark., 104 S. W. Rep. 1104.

74. **Indictment and Information**—Statutory Offenses.—An information charging an offense in the language of the statute is sufficient only when the words of the statute directly and without any uncertainty set forth the elements necessary to constitute the offense.—McGinnis v. State, Wyo., 91 Pac. Rep. 936.

75. **Intoxicating Liquors**—Evidence.—That wine alleged to have been illegally sold was an intoxicant may be shown by expert evidence of an analysis or by nonexpert testimony that it was intoxicating.—Nussbaumer v. State, Fla., 44 So. Rep. 712.

76.——Municipal Regulation of Sale.—The mayor and city council of a city may by ordinance regulate the places where intoxicating liquors are sold and designate the portions of the city where saloons may be conducted.—Territory v. Robertson, Okla., 92 Pac. Rep. 144.

77. **Judges**—Disqualification.—Under Comp. Laws, sec. 1109, a judge whose wife is a second cousin of the wife of a party held not disqualified by relationship by affinity to the party until the wife is substituted as a party on his death.—Bliss v. Tyler, Mich., 113 N. W. Rep. 317.

78. **Judgment**—Authority of Court After Term.—The entry by a clerk of a judgment the court did not render is a nullity, and the error thus committed is one which the court has jurisdiction to rectify, even at a term subsequent to that at which the judgment was rendered.—Kansas City Pump Co. v. Jones, Mo., 104 S. W. Rep. 1136.

79.——Matters Concluded.—A judgment of voluntary dismissal or dismissal on technical ground is no bar to a subsequent suit except as to the particular ground on which the dismissal was based.—Smith v. Cowell, Colo., 92 Pac. Rep. 20.

80.——Res Judicata.—A judgment roll in a former suit held not admissible as res judicata where there is no privity between defendants and either of the parties to the former action.—Silva v. Hawkins, Cal., 92 Pac. Rep. 72.

81. **Landlord and Tenant**—Breach of Lease.—On breach of a lease the landlord may terminate it and sue for the rent, suffer the premises to remain vacant and recover the entire rent, or sublet for the entire term as agent of the lessee.—Higgins v. Street, Okl., 92 Pac. Rep. 153.

82.——Sale of Land.—A grantee of lands subject to lease for years, reserving rent payable in installments, cannot declare a forfeiture and recover the premises on default in an installment accruing to his grantor before the conveyance.—Moulton v. Lawson, Neb., 113 N. W. Rep. 244.

83. **Libel and Slander**—Nature of Libel.—A publication held manifestly calculated to create a disturbance of the peace, and to bring an official into contempt, and therefore libelous as to him.—Commonwealth v. Duncan, Ky., 104 S. W. Rep. 997.

84. **Licenses**—Corporation Tax.—The license tax act of 1904 (24 Stat. at Large, p. 4621), as amended by the act of 1905 (24 Stat. at Large, p. 827), held not invalid because it imposes license tax on corporations not imposed on individuals doing the same kind of business.—Ware Shoals Mfg. Co. v. Jones, S. Car., 58 S. E. Rep. 811.

85. **Limitation of Actions**—Absence from State.—The courts will imply judicial excep-

tions from "invincible necessity" to the statute of limitations where it is legally impossible for plaintiff to sue within the time limited.—Weaver v. Davis, Ga., 58 S. E. Rep. 786.

86.——Accrual of Action.—The statute of limitations does not begin to run on an open, running, and mutual account until the date of the last item.—Vogel v. Kennedy, Mo., 104 S. W. Rep. 1151.

87. **Mandamus**—Reinstatement to Office.—A police officer wrongfully deprived of his office will be restored thereto by mandamus, but he will be remitted to a suit at law for arrears of salary.—Lattime v. Hunt, Mass., 81 N. E. Rep. 1001.

88. **Marriage**—Cohabitation. — Cohabitation essential to establishing a valid common-law marriage means a living or dwelling together as husband and wife in the same habitation.—Klipfel's Estate v. Klipfel, Colo., 92 Pac. Rep. 26.

89. **Master and Servant**—Acts Constituting Negligence.—The failure of a superintendent in charge of cutting trees to give warning of a falling tree held negligence proximately resulting in an employee's injury.—Curtin v. Clear Lake Lumber Co., Wash., 91 Pac. Rep. 956.

90.——Assumed Risk.—A brakeman, injured by being thrown from a log train by a sudden acceleration of the speed without notice, held not to have assumed the risk thereof.—Gulf, B. & K. C. Ry. Co. v. Harrison, Tex., 104 S. W. Rep. 399.

91.——Assumed Risk.—The danger that employees working in mills will become entangled in the wheels, cogs, etc., though they are in proper repair, is a danger incident to the employment.—Sibbert v. Scotland Cotton Mills, N. Car., 59 S. E. Rep. 79.

92.——Deviation from Regular Employment.—Where a person employed by a railroad as car inspector voluntarily undertook without authority the work of assisting a switching crew, the relation of master and servant was temporarily suspended.—Louisville & N. R. Co. v. Pendleton's Admr., Ky., 104 S. W. Rep. 382.

93.——Discharge of Servant.—Where a man with his team working under contract was discharged before the termination thereof, it was proper for the jury to consider the expense he would have incurred while not working during bad weather, and the responsibility attending the execution of the contract.—C. D. Smith & Co. v. Ohler, Ky., 104 S. W. Rep. 995.

94.——Evidence of Master's Negligence.—The mere fact that an accident happened by which a servant was injured does not itself create a presumption of negligence on the part of the master.—Omaha Packing Co. v. Sandúski, U. S. C. C. of App., Eighth Circuit, 155 Fed. Rep. 897.

95.——Injury to Servant.—In an action for injuries to a servant, plaintiff having set out the negligent acts which he claimed entitled him to recover, he was bound to prove such acts as laid.—Crane Co. v. Hogan, Ill., 81 N. E. Rep. 1032.

96.——Nature of Service.—A miner held not a volunteer in firing off the blast of a fellow miner who had left before quitting time, in accordance with the universal custom of the mine.—McHenry Coal Co. v. Render, Ky., 104 S. W. Rep. 996.

97.——Negligence.—A defendant held negligent in directing an employee to tie an electric light wire to an improper insulator with a piece of common iron wire.—Cumberland Telephone & Telegraph Co. v. Graves' Adm'x. Ky., 104 S. W. Rep. 356.

98.——Res Ipsa Loquitur.—Where a servant was injured by the falling of a plank from an upper story of a building, but there was no evidence as to the cause of its falling, the doctrine of res ipsa loquitur does not apply.—McGowan v. Nelson, Mont., 92 Pac. Rep. 40.

99.——Transitory Risk.—A master's duty to warn does not extend to transitory risks concerning which the only thing which the servants do not know is just when danger will come or when the danger is due to a transitory occurrence known to be liable to happen.—Norman v. Southern Ry. Co., Tenn., 104 S. W. Rep. 1088.

100. **Mechanics' Liens**—Property Subject.—The district court had jurisdiction to foreclose a mechanic's lien against the interest of the person in possession of school land, the title to which was in the United States.—Jarrell v. Block, Okl., 92 Pac. Rep. 167.

101. **Monopolies**—Owning, Controlling and Leasing Theaters.—Owning, controlling and leasing theaters and producing plays and booking contracts for the production of plays are not commerce, within Pen. Code, sec. 168, subds. 5, 6, prohibiting a conspiracy to commit any act injurious to trade or commerce.—People v. Klaw, 106 N. Y. Supp. 341.

102. **Mortgages**—Absolute Conveyances. — Whether a conveyance of land with an agreement to reconvey on payment of a debt constituted a mortgage or a conditional sale depends largely on whether the debt continued or was discharged by the conveyance.—Francis v. Francis, S. Car., 58 S. E. Rep. 804.

103. **Municipal Corporation**—Assessment Certificates.—By the sale of the public improvement certificates the city contracts that the purchaser shall receive a lien capable of being matured into a valid title, or the return of the consideration paid, with interest in case of redemption or of judicial determination that the certificates were invalid as the result of bona fide litigation.—Otis v. City of St. Paul, Minn., 113 N. W. Rep. 269.

104.——Widening Streets.—Where a city council fails to set aside a reasonable space along a street for sidewalks, the property owner may compel it to do so.—City of Georgetown v. Hambrick, Ky., 104 S. W. Rep. 997.

105. **Negligence**—Acts in Emergencies.—The fact that a person in an emergency chooses on the spur of the moment the more dangerous means of escape does not render him negligent as a matter of law.—St. Louis, I. M. & S. Ry. Co. v. Stamps, Ark., 104 S. W. Rep. 1114.

106.——Dangerous Premises.—Plaintiff, who was injured by falling from a retaining wall on Pikes Peak, held negligent in walking from the hotel at night in the manner he did.—Watson v. Manitou & Pikes Peak Ry. Co., Colo., 92 Pac. Rep. 17.

107.——Dangerous Substances.—A dealer who buys in the open market stove polish and sells it for a purpose for which it is intended is not liable in the absence of negligence, to the buyer

injured thereby.—Clements v. Rommeck, Mich., 113 N. W. Rep. 286.

108.——Excessive Verdict.—A defendant railroad company against which an excessive verdict for a brakeman's death had been awarded held not entitled to a new trial, where the verdict was reduced by remittitur to an amount not excessive.—Galveston, H. & N. Ry. Co. v. Wallis, Tex., 104 S. W. Rep. 418.

109.——Lost Clear Chance.—The rule that he who has a clear opportunity of avoiding injuring another by the exercise of proper care must do so held inapplicable where the person injured had the last clear opportunity to avoid the accident by the exercise of proper care.—Matteson v. Southern Pac. Co., 92 Pac. Rep. 101.

110.——Proximate Cause.—Where an injury is the result of a sequence of negligent acts, and the original wrong becomes injurious only in consequence of the intervention of some distinct wrongful act, the injury is imputed to the last wrong as the proximate cause.—Smith v. Norfolk & S. R. Co., N. Car., 58 S. E. Rep. 799.

111. **Nuisance**—Right to Injunction.—Where the noise from a factory is of a class incident to the neighborhood when complainant went into it, there is no cause for enjoining the same. —Austin v. Converse, Pa., 67 Atl. Rep. 921.

112. **Officers**—Legislative Power.—Where the constitution prescribes a mode for removing officers, the legislature may not authorize a removal in another mode.—Griner v. Thomas, Tex., 104 S. W. Rep. 1058.

113. **Pardon**—Privilege of Witness.—Where a witness testified for the state in a lynching investigation, he was thereby pardoned for participation in any offense growing out of the lynching, under Revisal 1905, sec. 3201, though his evidence did not tend to incriminate him.—State v. Bowman, N. Car., 59 S. E. Rep. 74.

114.——Revocation.—Where petitioner was granted a conditional pardon, the governor was authorized to issue his warrant revoking the pardon on breach of the conditions.—Spencer v. Kees, Wash., 91 Pac. Rep. 963.

115. **Partition**—Effect of Sale.—A purchaser on a partition sale held entitled to recover in an action at law two-thirds of the tract purchased; the wife of the intestate being in exclusive possession, claiming the whole, and ousting the plaintiff.—Gunter v. Fallaw, S. Car., 59 S. E. Rep. 70.

116. **Partnership**—Liability of Retiring Partner.—One who has dealt with a firm is entitled to rely on the status remaining unchanged until notified of the withdrawal of a partner.—Drewry-Hughes Co. v. McDougall, N. Car., 59 S. E. Rep. 73.

117. **Physician and Surgeons**—Revocation of License.—A license to practice medicine procured through the presentation of a pretended diploma from a fraudulent medical college, without examination will be revoked.—Gulley v. Territory, Okl. 91 Pac. Rep. 1037.

118. **Pilots**—Regulation by Congress.—Congress has paramount jurisdiction to regulate pilotage in the public waters of the United States, and its acts supercede all state laws on the subject.—State v. Ames, Wash., 92 Pac. Rep. 137.

119. **Principal and Agent**—Fraud of Agent.—A seller who has made a fair contract of sale to a principal through the latter's agent is not required to rescind the contract before it has been fully performed, on subsequently discovering fraud of the agent towards his principal. —Hayward Lumber Co. v. Cox., Tex., 104 S. W. Rep. 403.

120. **Principal and Surety**—Co-Sureties. —Where one signed as surety a note signed by two persons, without knowledge of the fact that one of the signers was a surety, he could not be held a co-surety with such signer.—Citizens' Nat. Bank v. Burch, N. Car., 59 S. E. Rep. 71.

121. **Public Lands**—Decisions of Land Department.—While the decisions of the land department on matters of law are not binding on courts, they should not be overruled unless they are clearly erroneous.—Hand v. Cook, Nev., 92 Pac. Rep. 3.

122.——Railroad Right of Way.—A railroad company appropriating for its right of way land by homestead entry is an unlawful trespasser, and obtains no right either in law or equity.—Enid & Anadarko Ry. Co. v. Kephart, Okl., 91 Pac. Rep. 1049.

123. **Quo Warranto**—Who May Maintain.—A private individual cannot maintain a bill in the nature of quo warranto to test a street railway company's right to use a public street in a city.—Thirteenth & Fifteenth Sts. Pass. Ry. Co. v. Broad St. Rapid Transit Ry. Co., Pa., 67 Atl. Rep. 901.

124. **Railroads**—Accident at Crossing.—In a suit for death at a crossing, it is not error to charge that, if the train was not running on schedule time, the jury may consider that circumstance in determining whether the deceased had reason to apprehend danger.—Wrightsville & T. R. Co. v. Gornto, Ga., 58 S. E. Rep. 769.

125.——Duty to Provide Safe Guards.—The care required of a company to provide safe guards at a crossing must be commensurate with the danger, and, where it has created an extraordinary danger, it is required to exercise extraordinary care, but it is not required by the law that the means adopted should prove effective.—Cincinnati, N. O. & T. P. Ry. Co. v. Champ, Ky., 104 S. W. Rep. 988.

126.——Injuries to Person on Track.—Whether a switchman employed with an engineer in switching cars discovered the peril of a person near the track in time to have signaled the engineer to stop the cars before reaching him held for the jury.—Texas & N. O. R. Co. v. Scarborough, Tex., 104 S. W. Rep. 408.

127.——Injury to Person at Crossing.—Employees in charge of a train held entitled to assume that a person is in possession of his faculties and will retain his place of safety and not recklessly expose himself to danger by going on the track.—Matteson v. Southern Pac. Co., Cal., 92 Pac. Rep. 101.

128.——Injury to Person Near Track.—Where one who is guilty of negligence in being too near a railroad track is not discovered by the engineer or fireman in time to prevent striking him by a train running from station to station, there is no actionable negligence.—Texas & N. O. R. Co. v. Scarborough, Tex., 104 S. W. Rep. 408.

150. **Witnesses**—Knowledge of Facts.—A witness who has seen the change of the grade of a street may testify as to the height, though he has not measured it.—Downey Bros. Spoke & Bending Co. v. Pennsylvania R. Co., Pa., 67 Atl. Rep. 916.